



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/21817/2016

**THE IMMIGRATION ACTS**

Heard at Manchester Civil Justice Centre  
On 25<sup>th</sup> June 2018

Decision & Reasons Promulgated  
On 12<sup>th</sup> September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR OLUWASEUN HAMID SHOTONWA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr C Holmes (Counsel)  
For the Respondent: Mr A Tan (Senior HOPO)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge M Davies, promulgated on 5<sup>th</sup> January 2018, following a hearing at Manchester on 27<sup>th</sup> November 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

**The Appellant**

2. The Appellant is a male, a citizen of Nigeria, and was born on 11<sup>th</sup> July 1979. He appealed against the decision of the Respondent dated 16<sup>th</sup> August 2016 refusing him

leave to remain in the UK. He had come to the UK as a visitor in December 2004 and had not returned. The basis of his application now was his family life with his partner and their child.

### **The Judge's Determination**

3. The judge heard evidence from a number of witnesses, including M E C and T M. He found that the Appellant had prevaricated in the answers given. He also found that even if there was a subsisting family life the Appellant could return to Nigeria to apply for entry clearance and no good reason had been shown why he could not. He held that there had been no evidence before him to indicate that the Appellant was in a genuine relationship with his partner and daughter and why they could not all return to Nigeria to live together there (paragraph 67).
4. The appeal was dismissed.

### **Grounds of Application**

5. The grounds of application state that the judge failed to take into account certain documentary and oral evidence; that the judge erred in relying on his finding that the partner had not mentioned her relationship with the Appellant, given that it was not material to the partner's application before the Home Office at the time; the judge also failed to give adequate reasons for the finding that the witnesses had prevaricated, and it was not the case that the Appellant's partner had been unable to answer questions; and finally, that the judge failed to take into account the Respondent's policy in relation to family life and the decision of the court in **MA (Pakistan)**.
6. Permission to appeal was granted by the Tribunal on 1<sup>st</sup> February 2018.

### **Submissions**

7. At the hearing before me on 25<sup>th</sup> June 2018, Mr Holmes, appearing on behalf of the Appellant, relied upon the grounds of application. First, the judge failed to deal with material evidence which demonstrated that there was co-habitation by the Appellant with his partner and his child which went back to 2014. There was a TV licence bill dated 24<sup>th</sup> September 2014 and there was disclosure of payments made dating back to 17<sup>th</sup> March 2014 in relation to that, all of which was neglected. Furthermore, the Appellant's daughter had a letter from the school dated 13<sup>th</sup> May 2015, which referred to how the Appellant "has fully supported her education and is in full communication with the school as her parent". In the circumstances, it did not make sense to say that there was no evidence of the Appellant's relationship with his child.
8. Moreover, there was a third witness, R I, who was present in court, but who was not subjected to cross-examination, because his evidence was treated as though he had adopted his witness statement, to which the judge does not make any reference.
9. Second, the judge was wrong to criticise the Appellant's partner for not having mentioned the Appellant in her application for indefinite leave to remain. It was the Appellant's partner who, after five years of leave to remain in the UK as a

refugee/beneficiary of humanitarian protection, had applied for indefinite leave to remain, and the form in question does not request any such information, which is in any event irrelevant to the application for an extension of her protected status. The Appellant's partner had in fact in her witness statement in the supplementary bundle, made it clear that the Appellant was not at the time dependent upon her application, so there was no need to mention him. The judge overlooked this.

10. Third, there had been a failure by the judge to give adequate reasons, when he has stated that "witnesses prevaricated throughout their evidence as did the Appellant's partner. When asked difficult questions, the Appellant's partner simply said she could not remember". However, as far as the Appellant's partner was concerned, Mr Holmes submitted that she had answered all the questions.
11. Fourth, there had been a flawed consideration of the best interests of the Appellant's child. This was not least given that the Secretary of State's own policy stated that a seven-year-old child who had been resident in the UK would be allowed to stay. The published policy and the associated case law had not been taken into account. It was clear from the IDI entitled "Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes", that "strong reasons will be required in order to refuse a case with continuous residence for more than seven years" (see paragraph 11.2.4). Moreover, Elias LJ in **MA (Pakistan) [2016] EWCA Civ 705** had stated (at paragraph 46) that where there is such a length of residence children will "put down roots and develop... social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK". Indeed, his Lordship had gone on to say (at paragraph 46) that, "in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment".
12. Mr Holmes submitted that the Appellant in the present case was in a far stronger position in that the child had been in the UK for over eight and a half years. The judge made no reference to the extended period of residence of the child and nor is the Respondent's policy, and binding jurisprudence, assessed in the conclusions at paragraphs 67 to 68.
13. Finally, and perhaps most importantly, Mr Holmes submitted that the judge had stated (at paragraph 67) that, "I have received no evidence to indicate that... they cannot all return to Nigeria to live together". However, the fact was that the Appellant is a Nigerian national, but his partner and daughter are not, both of whom being Zambian nationals, and neither would therefore be "returning" to Nigeria. This was a mistake of fact in relation to the Appellant's family's nationality and there was a failure to consider this as a material fact.
14. For his part, Mr Tan submitted that the judge's primary findings were that he did not accept the relationship (see paragraph 57). However, he would have to say that the decision "is muddled up". Furthermore, it was not correct to say that the Appellant's partner could not have disclosed the existence of her partner, the Appellant, when she made her application for indefinite leave to remain, because paragraph 14 of the

application requires an answer to what social/cultural ties the applicant has. Finally, the judge does explain, at paragraphs 33 to 35, how a number of important questions, that were put to the witnesses, were not adequately answered.

15. In reply, Mr Holmes submitted that the judge did not engage with the whole evidence. The third witness was not even mentioned. There was evidence from the child's school which was not referred to. There was evidence in relation to the Appellant living with his family going back to 2012 which was not taken into account.

### **Error of Law**

16. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law (see Section 12(1) TCEA 2007) such that I should set aside the decision. My reasons are as follows. Whereas I do not accept much of the criticism raised by Mr Holmes of the Judge's determination, for example in relation to the evidence of the witnesses being ambivalent, for which the judge gives examples at paragraphs 33 to 35; and whilst I do not accept that a failure to refer to the third witness, R I, in the determination, is a material error of law, given that that witness was not called to give evidence, in circumstances where the other two witnesses who did give oral evidence were referred to by the judge, nevertheless, there is an error in relation to the Appellant's family life with his child.
17. Mr Tan submitted that the judge did not accept the relationship between the Appellant and the child at paragraph 57. I note that he stated that, "it is more probable than not that the Appellant and herself and her child were not in a relationship which amounted to family life" (paragraph 57).
18. However, this is confusing given that towards the end of the determination the judge states that "I take into account that the Appellant's relationship with his claimed partner has existed when the Appellant was unlawfully in the United Kingdom" (paragraph 65), which appears to indicate the possibility of the relationship having existed. Added to this is the statement thereafter that, "if the Appellant does have a genuine and subsisting parental relationship with the qualifying child I have received no evidence to indicate that it would not be reasonable to expect that child to leave the United Kingdom" (paragraph 67).
19. The fact is that such evidence existed, and not least in the form of a school letter, and the fact of the parties' co-habitation as a family unit together. It may well have been open to the judge, having apprised of himself of this fact, to conclude in precisely the manner that he did. However, it was not open to the judge to say that there had been no such evidence when it was provided in the Appellant's bundle.
20. The same paragraph then continues to go on to say that there was no reason why "they cannot all return to Nigeria to live together. It would indeed be in the child's best interest for her to do so" (paragraph 67).
21. At this stage, it was incumbent upon the judge to consider the Home Office policy and the case law in **MA (Pakistan) [2016] EWCA Civ 705**, in the manner that Mr Holmes has pointed out, because there is a presumption there, although a rebuttable one, of

allowing a child with seven years' residence to remain, subject to "strong reasons" being shown for why this should not be the case. In this case, one thing that the Appellant, his partner, and his child could not do, was to return to Nigeria together, because his partner and child are Zambian nationals.

**Decision**

22. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge M Davies, pursuant to Practice Statement 7.2(a) so that findings of fact can be made on the relevant issues outlined in this determination.

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

8<sup>th</sup> September 2018